The Solicitors' Journal

VOL. LXXXI. **Saturday, September 11, 1937.** No. 37

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1853.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £2 12s., *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 1d. *post free.*
CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.
ADVERTISEMENTS: Advertisements must be received not later than 1 p.m. Thursday, and be addressed to The Manager at the above address.

Current Topics.

Civil Juries in Scotland.

SINCE its importation from England, rather more than a century ago, the civil jury has always been something of an exotic in Scotland, and once again it is being made the subject of animadversion north of the Tweed. According to a writer in the current issue of the *Scottish Law Review*, the civil jury "is coming under heavy criticism at the moment," and various comments are cited from the lay press expressive of dissatisfaction with the system. Why is this? To some extent it is attributable to the heavy burden cast upon the citizens of Edinburgh and residents in the immediately adjoining counties from among whom the jurors are chosen to settle the "civil squabbles of all kinds from all parts of Scotland"; but besides this special grievance, there is still, as there was in the past, a fairly general feeling that to invoke a jury for the decision of a civil dispute was altogether unnecessary—a feeling that has been gaining ground with us in England during the last twenty years or so. Sir WALTER SCOTT, who, it is true, always looked with considerable jealousy on any tampering with Scottish institutions, could, he said, discover no ground for "suspecting that the judgments of a few well-educated and upright men may be influenced by any undue bias" or that "an interest, merely patrimonial, is more safely lodged in an obscure and evanescent body than in a dignified, independent, and permanent tribunal, versed in the science to be administered, and responsible for the decisions they pronounce." Brushed aside at the time as one more instance of the innate conservatism of Sir WALTER, his views, on this subject at least, are finding more acceptance than they once did. Curiously enough, much of the popular opposition to the introduction of the jury in civil cases was based on the requirement of unanimity of verdict. LORD COCKBURN told us that the religious objection, which resolved into the perjury (as it was called) of the minority, sacrificing its conscience to the conscience of the majority, was the one that made the deepest impression on the Scotch mind, and he added that "experience has not in the least diminished our Scotch aversion to it," but some years after these words were penned the obnoxious rule was repealed, for, by a statute of 1854, the year in which COCKBURN died, the necessity for a unanimous verdict was abolished.

Medicine and Motoring.

READERS whose interests, whether for professional or other reasons, lie in the direction of road traffic problems will find much food for thought in a series of articles which appears in the September issue of *The Practitioner*. It is impossible within the space at our disposal to give even a summary account of the matters discussed in these articles, but, in a realm in which both medical and legal professions have much to say and in which their combined efforts should be productive of general advantage, it is thought that a few observations indicative of the ground covered may not be out of place. Dr. MILLAIS CULPIN, Professor of Medical Industrial Psychology, London School of Hygiene and Tropical Medicine, alludes in the course of a discussion of the psychology of motoring to the dangerous driver, and urges that it is in the recognition and elimination of the driver of this character that we have most to learn. The impracticability of standardised tests on the lines which have yielded useful results in the discovery of the accident-prone in industry is recognised, but it is thought that something could be expected from the psychological examination of drivers who have met with accidents, and that this should certainly be carried out. The examination of witnesses and the decision in open inquiry that a particular person was to blame may, it is intimated, satisfy our sense of justice, but it leads no further towards an understanding of why that person failed, and the writer indicates that, in his own experience, he has, in the course of a psychological examination, occasionally elicited the cause of an earlier accident that was not apparent to an ordinary inquirer at the period of its occurrence. The writer goes on to discuss psychopathological causes of road accidents in technical terms unsuitable for reproduction here. It is perhaps unnecessary for us to enlarge upon the obvious difficulties and opportunities for abuse presented by compulsory examination of drivers involved in road accidents. Indeed, Dr. CULPIN does not in terms suggest this, but he rightly points to the valuable contribution to road safety which the medical practitioner can make in the case of patients who have the wisdom to follow good advice. In connection with the large percentages of accidents for which pedestrians are said to be to blame, the writer urges that there is a difference between a fault and a misfortune, and that it is the misfortune of the pedestrian

that a moment of indecision or inadvertence may endanger his life or limbs.

The Drivers' Eyesight.

"CAN you read at a distance of twenty-five yards in good daylight (with glasses, if worn) a motor-car number plate containing six letters and figures?" Such is the familiar question addressed to applicants for driving licences concerning eyesight. For the purpose of seeing the bends and crossings of the road, and for the recognition of objects in the roadway, that is to see pedestrians and animals well enough to be able to judge of their probable movements, this standard is, according to Dr. N. BISHOP HARMAN, consulting ophthalmic surgeon, West London Hospital, probably enough. "But," he continues in his article "Vision and the Motorist" in *The Practitioner*, "the fact that this criterion alone is recognised seems to belittle other factors of vision, which for walking, and particularly for driving, are of far greater importance." One of the points upon which the writer lays stress is the necessity of a good and sufficient field of vision, particularly in a lateral direction. Defects of fields of vision are, it is stated, much less common than defects of acuity, but persons suffering from defects of the former kind are frequently unaware of their existence, while the dangers of such limitation are well indicated in the article referred to. Mention is made of the fact that other states in Europe and America have passed laws requiring certificates of medical fitness which are much more definitive—the standard in Germany which has reference to the field of vision is cited—and the writer expresses the opinion that a statutory requirement, such as that in this country, which refers only to visual acuity, and ignores field of vision, is "a poor one for the safety of the driver and of other road users." The importance of binocular vision, which appears to be very highly developed in man, is also stressed, strictures being passed on the one-eyed driver, notwithstanding the remarkable skill occasionally displayed by persons suffering from this defect, and due weight is given to defects of ocular muscle balance, which in their more extreme forms may be a source of danger. Of factors leading to poor visibility—night driving, colour blindness, glare and fog—mention need only be made of the second. Dr. HARMAN suggests that the colour-blind motorist might be assisted by light signals being differentiated by shape as well as by colour, but it may be urged that if the statutory requirements are observed the word "Stop," though not "Go," will be marked on the appropriate lens and that the positions for the various colours are invariably the same. The writer emphasises the importance of a strict examination of and the insistence of a high standard in the case of the transport driver.

Income Tax and Foreign Securities.

READERS will recall the decisions in the recent cases of *Paget* v. *Inland Revenue Commissioners* and *Cross* (*H.M. Inspector of Taxes*) v. *London and Provincial Trust Ltd.*, which were referred to in these columns under "Recent Decisions" on p. 639 of our issue of August 7th last. In the course of a recent circular, which the Board of Inland Revenue has caused to be sent to bankers, paying agents and coupon dealers in Great Britain and Northern Ireland, it is intimated that appeals have been entered against these decisions, and it is suggested that, having regard to the special features of the cases on which the decisions were given, some modification of procedure should be adopted in cases of the issue by paying agents of bonds, certificates, etc., under a funding scheme or similar operation, and of the sale by bankers or purchase by coupon dealers of coupons for interest the payment of which in the normal manner and currency has been suspended. The Board considers that in such cases the following procedure may appropriately be adopted by those to whom the circular is addressed in relation to warrants, coupons, etc., in respect of which they would have been liable "under the law as hitherto understood," to deduct and account for tax in accordance with r. 7 of the third set of rules applicable to Sched. C or r. 7 of the Miscellaneous Rules applicable to Sched. D to the Income Tax Act, 1918. The consent of the taxpayer concerned should be obtained before tax is deducted, and the latter should be informed (a) that the relevant decision of the High Court is under appeal; (b) that any tax deducted in accordance with the arrangements will be refunded to him by the revenue, if it should ultimately be found not to be legally payable; and (c) that if tax is not deducted, but is ultimately found to be legally payable, he will be called upon to pay the tax under a direct assessment made upon him. Moreover, it is said, in order to ensure that in the event of tax deducted being repayable, all repayments may be duly made, or that the tax may be collected, if necessary, from the taxpayers concerned in respect of any payments made without deduction of tax, there should be furnished, with the periodical payments made by bankers, paying agents and coupon dealers to the Inspector of Foreign Dividends, lists showing with regard to all payments to which the circular relates made after 30th July, 1937 (the date of the aforesaid decisions), the date and amount of each payment, the full title of the security, the name and address of the person to whom payment is made, and whether tax was deducted. Tax deducted, it is stated, should be accounted for in the usual way.

Coal (Registration of Ownership) Act, 1937.

MENTION was made in these columns during its passage through Parliament of the Coal (Registration of Ownership) Act, 1937, which received the Royal Assent on 30th July. The object of the measure and its principal contents have already been indicated and notwithstanding the importance of many of its provisions the present is hardly the place for detailed treatment. It should, however, be noted that applicants for registration who desire to take advantage of the benefits offered by the Act are required to comply with the rules of procedure concerning the information to be supplied, while the rules made by the Board of Trade on 9th August contain prescribed forms in which applications for registration and statements to be furnished with such applications are to be made. Moreover, applications for registration must be made within six months from 17th August, when the Board of Trade published a notice in the *London* and *Edinburgh Gazettes* of the rules of procedure having been made by them. Information as to procedure and the necessary forms are obtainable from the Coal (Registration of Ownership) Department of the Mines Department of the Board of Trade, 55 Broadway, London, S.W.1.

Central Criminal Court: September Session.

ONE charge of murder, two of attempted, two of threats to murder, and four of manslaughter figure in the list of cases before the Central Criminal Court during the present month. The September session opened on Tuesday with a heavy calendar, as is usual at the present season of the year, owing to the fact that the court did not sit in August. At the beginning of the week there were 143 persons awaiting trial or sentence. In addition to the charges previously enumerated, the list included one charge of robbery with violence, two of rape, three each of malicious wounding, causing grievous bodily harm, demanding money with menaces, false pretences, coining, fraudulent conversion, and effecting a public mischief, six charges of forgery, eight of conspiracy to defraud, nine of bigamy, ten of stealing, twelve of breaking and entering, one each of publishing a defamatory libel, and attempting to prevent the due administration of justice, and one offence under the Bankruptcy Acts. Cases in the High Court judge's list are being dealt with by HILBERY, J.

Criminal Law and Practice.

KILLING WHILST COMMITTING A FELONY.

THERE has never been any real doubt that a person who kills another " by an act of violence done in the course or in the furtherance of . . . a felony involving violence " is guilty of murder. The words quoted are from the speech of Lord Birkenhead, L.C., in *Director of Public Prosecutions* v. *Beard* (1920), A.C. 479, at p. 493, where the principle was applied to a case of rape in which the prisoner had accidentally killed his victim by placing his hand over her mouth and his thumb on her throat. The rule is narrowed down somewhat by Mr. Justice Stephen's well-known direction to the jury in *Reg.* v. *Serné* (1887), 16 Cox C.C. 311, in which he suggested that the rule should be confined to felonious acts dangerous to life.

Recently, in *Rex* v. *Stone* (p. 735 of this issue) it was argued in the Court of Criminal Appeal that if death does not result from an attempt to commit rape the only crime committed is a misdemeanour, and, therefore, if death does result it is not murder, but manslaughter. It was said that a man was never to be regarded as guilty of a crime until he had put it out of his power to withdraw from the completion of the crime, and that there must always be a *locus poenitentiae*.

The complaint of the appellant was that the Lord Chief Justice had misdirected the jury by his answer to a written question submitted to him by them after their retirement. The question was: " If as a result of an intention to commit rape a girl is killed, although there was no intention to kill her, is the man guilty of murder?" The answer of the Lord Chief Justice was " Yes. Undoubtedly."

Mr. Justice Swift affirmed that the Lord Chief Justice's answer was a correct statement of the law. His lordship distinguished the cases in which the liability had been considered of persons who had been concerned with an illegal operation for the purpose of procuring abortion, from which death had resulted (*R.* v. *Whitmarsh*, 62 J.P. 711, and *R.* v. *Bottomley*, 115 L.T. Jo. 88). He said that in those cases, although an illegal act was being done there was no intention to do any harm or anything against the wish of the person hurt; indeed, the desire was to help or assist that person It should be recalled in this connection that the proper direction to the jury is that given by Avory, J., in a similar case (*R.* v. *Lumley*, 22 Cox 635), that if when the prisoner did the act, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder; but if he could not as a reasonable man have contemplated either of those consequences, he was guilty of manslaughter.

It is clear that if the argument on behalf of the appellant in *R.* v. *Stone* were valid, that an attempt to commit rape is only a misdemeanour and, therefore, resultant death cannot be the basis of a murder charge, this would effect a complete reversal in practice of the principle so clearly laid down in *R.* v. *Beard* (above), especially in the most violent and least deserving class of case, where death results from the felonious act.

Reference was recently made to this doctrine of " constructive murder " at an inquest at Paddington (*The Times*, 4th August) in which the coroner recorded a verdict of " suicide while of unsound mind by jumping from a height." The deceased had thrown herself from an upper storey office window. Her falling body struck a foot-passenger who was walking along the street, flung him to the ground and caused him to receive injuries from which he died the same day.

The coroner said that the doctrine of constructive murder and constructive manslaughter had been falling into abeyance of recent years and had not been construed so strictly as it used to be. In this case, too, a less stringent view should be taken of the circumstances, because the deceased never intended to hurt anyone but herself. He therefore found as stated above, " because her mind was not in that state which would enable her to perform a felonious intent."

There is no ground for criticising the coroner's finding in this case, but it is clear from the authorities quoted above that his statement of the law, at any rate with regard to constructive murder, is not quite accurate. It yet remains to be decided whether suicide is a felonious act which involves violence within Mr. Justice Stephen's definition in *Reg.* v. *Serné* (above), but the rule has not been relaxed. In the case of constructive manslaughter it is true a less stern view of the law has been taken, particularly with regard to death which results from lesser degrees of negligence (see Lord Atkin's judgment in *Andrews* v. *Director of Public Prosecutions*, *ante*, p. 497, and previous article on this subject, *ante*, p. 408) and no doubt the coroner had this in mind.

BOX TRICYCLES AND SUNDAY TRADING.

AN interesting question under the Shops (Sunday Trading Restriction) Act, 1936, was recently considered by the Hull stipendiary magistrate (*The Times*, 12th August) in a case in which the Eldorado Ice Cream Company Ltd. were summoned for infringing the Act by employing two men other than as prescribed by the Act. It appeared that the men were employed for more than four hours on the first Sunday in May and were employed on more than two other Sundays in that month. One was employed to sell ice-cream from a barrow and the other sold ice-cream from a box tricycle which he pedalled through the streets.

Under s. 15 (1) of the Shops (Sunday Trading Restriction) Act, 1936, " shop " has the same meaning as it has in the Shops Act, 1912. Under s. 19 (1) of that Act it is defined as including " any premises where any retail trade or business is carried on." Section 13 of the Shops (Sunday Trading Restriction) Act, 1936, provides that the Act " shall extend to any place where any retail trade or business is carried on as if that place were a shop."

It was pointed out, on behalf of the defendants that a box tricycle could not be a " place " within the meaning of the Act. The learned stipendiary magistrate dismissed both summonses and said that he was willing to state a case.

There is as yet no decision on the meaning of the word " place " in the 1936 Act. It is doubtful whether the decisions on the meaning of that word in s. 3 of the Betting Act, 1853, afford a perfect analogy, as the object of that Act was to prevent nuisances, and the essence of the nuisance against which that section was directed was its localisation (*R.* v. *Humphrey* [1898] 1 Q.B. 875). It is doubtful whether localisation is of such great importance in an Act like the Shops (Sunday Trading Restriction) Act, 1936, the object of which, according to the preamble, is " to restrict the opening of shops and trading on Sunday." On the other hand, it seems difficult to reconcile the clear meaning of the word " place " with the peregrinations of a box tricycle, and it may well be that this case has revealed a gap in the Act which will have to be closed up by further legislation.

Mr. and Mrs. Barrow Cadbury, of Birmingham, have invited 250 probation officers, says *The Times*, to be their guests at an autumn school to be held at The Hayes, Swanwick, Derbyshire, from 29th October to 1st November. It is expected that a number of magistrates will also attend. The general theme of the course to be presented will be " Probation as it touches Home Life." Lord Feversham, Mr. S. W. Harris (Assistant Under-Secretary, Home Office), Mr. B. J. Reynolds, Dr. Herbert Gray, Dr. Robinson, of Overdale College, and others will be present, and a special feature will be made of the social life of the school.

The Matrimonial Causes Act, 1937.

(*Continued from p.* 708.)

Grounds for Wife's Petition.

The grounds on which a wife may obtain a divorce, namely rape, sodomy and bestiality, date from s. 27 of the 1857 Act. The inclusion of rape under the new Act needs some consideration. Subject to what is said below, rape always includes adultery, itself a sufficient ground for divorce under the new Act. When adultery alone was not sufficient for a wife's petition, rape was a necessary additional ground. Now, however, a wife would not incur any additional expense for the purpose of proving rape, if such were necessary, beyond that incurred in proving the adultery. Considerable expense might be saved where the husband has been convicted; all the wife need then prove is the conviction and the identification of her husband with the convict.

A husband cannot himself rape his wife, but he may be a party in the second degree to the commission of the crime by another: *Lord Audley's Case*. If such an atrocious crime were committed by a husband, nothing could be more just than that the marriage should be dissolved, and it is submitted that the section covers it.

The Absolute Bars.

Section 4 substitutes a new s. 178 for that of the principal Act, which, after laying down the duty of the court "to inquire so far as it reasonably can" into the facts, and as to whether there has been any connivance, condonation or collusion, continues:—

> "(2) If the court is satisfied on the evidence that—
>
> "(i) the case for the petition has been proved;
>
> "(ii) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and
>
> "(iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents:
>
> the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:"

Connivance, condonation and collusion accordingly remain absolute bars—the last also applying in the case of a divorce based on cruelty—but the onus appears to have shifted to the petitioner to establish their non-existence. Applying once more the illegitimate method of referring to the debate in the House of Lords, it is quite clear from the answer given by Lord Roche to Lord Salisbury's speech, that the object of this section is to stop "the few but gross cases of collusion which now take place": see Official Report, Lords' Debate, 7th July, 1937, col. 153. The section deals with connivance and condonation in exactly the same way as collusion, so that it is clear that it was intended to strengthen the bars. It is submitted that the section achieves the object of its framers.

The court must, it is submitted, be satisfied affirmatively in every case that the absolute bars do not exist. If this view be correct it need not occasion undue alarm among would-be petitioners and their legal advisers. Probably two precautions will be sufficient in an undefended case, one that the affidavit in support of the petition should deny collusion, connivance and condonation, and that the petitioner in his or her evidence at the trial should deny them on oath.

In a defended case the respondent will usually raise any matters constituting an absolute bar, but, subject to that distinction, the defended case will be on the same footing as an undefended case.

If a petitioner were bound to produce a string of witnesses in every case to prove the absence of the absolute bars, the work of the Divorce Division, and of Assizes, would be brought to a standstill. It is true that if the words of the section clearly required such a construction the courts would so interpret it, but far from such a construction being necessary the expression "so far as it reasonably can" suggests that no such prolonged and exacting investigation is, in the majority of cases, required. It is however, clear that in future the court will be even more astute than it is at present to find connivance, collusion or condonation if a shadow of suspicion appears in the course of the case.

Discretionary Bars.

Under the proviso to s. 4 the discretionary bars are as before:—

(1) The petitioner's adultery.
(2) Unreasonable delay in presenting the petition.
(3) The petitioner's cruelty.

There is applied to a petition on the ground of cruelty the discretionary bar of the petitioner's desertion or wilful separation. This discretionary bar continues to apply to a petition founded on adultery. Conduct conducing is a discretionary bar not only if it has brought about adultery as before, but also if it has conduced to the unsoundness of mind or desertion, if either is relied on for the divorce.

Judicial Separation.

The grounds for judicial separation are to be those which will support a petition for dissolution, and, in addition, as hitherto, failure to comply with a decree of restitution of conjugal rights and any ground upon which a decree of divorce *à mensâ et thoro* might have been pronounced before the Act of 1857. The court must be equally astute to find the absolute bars as in the case of divorce, and the other provisions as to the absolute or discretionary bars apply.

By s. 5 (2) the effect of the decree will be that the petitioner need no longer cohabit with the respondent.

Effect of Previous Decree.

A decree of divorce may be granted notwithstanding that a decree of judicial separation, or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, has been made on substantially the same facts. By s. 6 (2) the court may rely on the previous decree as sufficient proof of the ground upon which it was granted. This seems declaratory of the existing law, *cf. Bland* v. *B.* (1866), L.R. 1. P. & D. 237, and *Harriman* v. *H.* [1909] P. 123, C.A. It is, however, necessary for the petitioner to give evidence.

The desertion preceding the decree or order, if the parties have not resumed cohabitation, is to be taken as having occurred immediately before the presentation of the divorce petition, s. 6 (3). The effect of this appears to be that the desertion preceding the decree or order will have to be for three years at least. On this, see *Harriman* v. *H.*, *supra*.

Nullity.

A number of new grounds upon which a decree of nullity may be based are given by s. 7, namely:—

(a) Non-consummation due to wilful refusal of respondent.

(b) Either party was at the time of the marriage of unsound mind or a mental defective under the Mental Deficiency Acts, 1913 to 1927, or subject to recurring fits of insanity or epilepsy.

This extends the present law, under which a ceremony of marriage with a lunatic so found is wholly void under the Marriage of Lunatics Act, 1811, and a marriage with a person who does not understand the nature of the marriage contract is voidable in accordance with *Turner* v. *Meyers*, falsely calling herself Turner; p. 708, *ante*.

(c) The respondent was at the time of the marriage suffering from venereal disease in a communicable form.

Presumably, in most cases, this will be proved by the petitioner showing that he or she contracted the disease, and could not have contracted it from anyone other than the respondent.

(d) Pregnancy of the respondent at the time of the marriage by someone other than the petitioner.

In cases (b), (c) and (d) the court must be satisfied of all of the following :—

(i) that the petitioner was ignorant of the facts at the time of the marriage ;

(ii) the proceedings were instituted within a year of the marriage ;

(iii) marital intercourse with the consent of the petitioner has not taken place since the discovery of the petitioner of the grounds for a decree.

The consent, in a case coming under (b), where the petitioner was mentally unfit, would presumably mean consent during a time when the petitioner was capable of understanding not only the nature of the act but its bearing on what had gone before.

Presumption of Death.

A party to a marriage may, under s. 8, have the other party presumed dead and the marriage dissolved, if reasonable grounds exist for the presumption. Seven years' absence, during which the petitioner has no reason to believe that the other party is living, is " evidence that he or she is dead until the contrary is proved." It would seem that a petitioner proving the seven years' absence, and that there was no reason to believe that the other was living, will, if no evidence is given to the contrary, be entitled to the order *ex debito justitiæ*.

In these proceedings the court may seek the assistance of the King's Proctor. Presumably, in due course, rules of court will be made dealing with the question of advertising the petition under this section.

Decree Absolute.

By s. 9 an additional sub-section is provided to s. 183 of the principal Act, to enable the party against whom a decree *nisi* has been granted to apply to have it made absolute, if the other party has not done so within three months of having the right to apply. On such application, the court may either pronounce a decree absolute, reverse the decree *nisi*, direct further enquiry or otherwise deal with the case as the court thinks fit. Presumably, a correspondent or intervener will have a right to be heard on the application : *cf. Worsley* v. *W. and W.* [1904] 20 T.L.R. 171, C.A.

Clergyman.

By an amendment to s. 184 of the principal Act, not only, as hitherto, may a clergyman of the Church of England refuse to solemnize the marriage of a person whose marriage has been dissolved and whose husband or wife is still living, but he is now entitled to refuse to allow the marriage in the church or chapel of which he is minister. A clergyman of the Church of Wales is given a like privilege.

Alimony and Maintenance.

Proceedings for alimony, maintenance, the settlement of wife's property, the application of property which is the subject of marriage settlement and the securing of money for the benefit of the children, taken under ss. 190-193 of the principal Act, may be instituted immediately after the petition for divorce or nullity has been presented, but no order, other than for alimony *pendente lite*, may be made until after decree *nisi* (s. 10 (1)).

In the case of a petition for divorce or judicial separation on the ground of the husband's insanity the wife may be ordered to secure property or pay alimony or maintenance to the husband, and, in a converse case, the husband may be required to pay alimony or maintenance to persons having charge of the wife.

The court is given power to order the husband on a decree of divorce or nullity, or the wife on her petition for divorce on the ground of her husband's insanity, to secure property for the benefit of the children (s. 10 (4)).

Summary Jurisdiction Acts.

Section 11 provides that a woman may apply for an order under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of the husband's adultery, and a man may apply on the ground of his wife's adultery.

On an application by the husband on the ground of adultery the magistrates' court may, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, make any of the orders set out in the Licensing Act, 1902, s. 5, which provide for—

(*a*) non-cohabitation ;
(*b*) custody of children ;
(*c*) maintenance up to £2 a week ;
(*d*) costs ;

and, curiously enough, that the wife may, with her consent, go into any retreat licensed under the Inebriates Acts !

Condonation, connivance, collusion and conduct conducing are absolute bars to an order on the grounds of adultery.

Domicile.

Where a husband domiciled in England or Wales deserts his wife or is deported, and changes his domicile, the court will nevertheless have jurisdiction for the purpose of Part VIII of the principal Act, that is in respect of all matrimonial causes ; including legitimacy declarations.

Application.

The new Act will not apply to Scotland or Northern Ireland.

There can be no doubt of the importance of the Matrimonial Causes Act, 1937, nor can there be any doubt that a great deal of work has been left to the courts to mould it into shape.

Company Law and Practice.

Share-pushing.—III.

When I left off my article last week my readers may remember that I had still to deal with the observations contained in the share-pushing report on proviso (*c*) of sub-s. (2) of s. 351 of the Companies Act. Briefly, this sub-section is intended to secure that a certain amount of instruction contained in a statement in writing shall be available to a person to whom shares are privately offered for sale. The powers exclude the operation of these provisions in certain cases and the last proviso to this sub-section, proviso (*c*), which is of some importance, provides that the sub-section shall not apply " where the offer was made only to persons with whom the person making the offer has been in the habit of doing regular business in the purchase or sale of shares." The report states that the committee feel some difficulty with regard to this proviso and they point out that it is not easy to see exactly what is meant by the phrase " in the habit of doing regular business in the purchase or sale of shares." For example, they ask would it be sufficient to constitute this relationship if the broker reasonably regarded the investor as his client, which would probably be brought about by only one transaction between them, irrespective of the time that had elapsed between the two occasions, although there be more constant items of business, and they compare the case of a solicitor who they say would probably regard as a client a person who had on one occasion only consulted him " but could such a person be regarded as being in the habit of doing regular business with the solicitor ?" The question they conclude is one to be decided on the facts of each individual case. The phase is as they also note tautologous in any case if the word " regular " is to be understood to mean repeated, already implied in the phrase " in the habit of," though they suggest that its proper construction might possibly be proper or genuine and straightforward business.

The methods of the share-pushers described in the report of obtaining victims are to send out circulars inviting the public to consult them and obtain their advice upon investments, to communicate with the victims by telephone, and to purport to carry out transactions in which a profit is shown from the supposed purchase and sale in particularly favourable circumstances known only to the share-pusher, of well-known shares, are all aimed at achieving the end of gaining the confidence of the ultimate victims. This subsidiary object, the report suggests, is to establish a positive connection which may be regarded as being "in the habit of doing regular business" with them. It is difficult to see how a series of supposed transactions could create this relationship whatever construction may be put upon the word "regular." The word "business" would seem to imply that there is some kind of contractual operation carried out between the parties, and where one is consistently deceived by the other, even to his advantage at some period, it is not easy to see how that can constitute business. In many cases, however, the share-pusher circularises a great number of people with respectable-looking market reviews containing well-informed comment on leading quoted shares and their prospects, and thus having established a feeling of confidence, invitations are sent out to the persons circularised to submit a list of their investments. Latest advice can be given free of charge as to their retention or substitution by others to be recommended. In the view of the Committee, this is primarily done to see which of the persons circularised are worth taking up seriously. They suggest as an additional reason for this course being taken that those who reply to the invitations may be regarded as being in the habit of doing regular business within this sub-section. Even if this were not the case it would not be a very difficult matter to carry out a few genuine transactions so as to constitute this relationship.

The report contains suggested heads of a new form of s. 356 which the committee consider it necessary to retain, whatever steps may be taken to restrict the activities of share-pushers as constituting an essential part of any effective measure to prevent personal touting and share-pushing and other swindles in dealing with shares.

The recommendations made by the Committee in connection with s. 356 are shortly these. They suggest an entirely new form for sub-s. (1), their comments on which I dealt with last week, which is as follows: "It shall not be lawful for any person being or purporting to be a dealer in shares or a representative of any such person during any call made by him upon any other person to offer any shares for subscription underwriting or purchase or to negotiate the subscription underwriting or purchase by such other person of any shares." The suggested sub-section goes on to exclude (1) calls on persons whose business it is to deal in shares; (2) calls by exempt persons or their authorised representatives; (3) undertaking during any call as an agent the transaction of business in shares with an exempt person or agreeing to do so or advising such a transaction. The sub-section also provides, following the report of a South African Committee on Company Law Amendment, that the word "call" shall include any communication by telephone, in view of the fact that a considerable amount of work is done by share-pushers on the telephone for which they frequently even take "batch-bookings" for the post office. The expressions used in this section which appear at first sight extremely vague have the same meanings as are assigned to them in the "Heads of a Draft Clause" recommended by the Committee to secure that outside brokers shall be registered in a particular way, in accordance with their recommendations in that respect. The expressions so defined are as follows: "Dealer in shares" means any person whose business or part of whose business is to transact business in shares. "Shares" for this purpose is to include shares in any company whether limited or not, debentures and units which are defined to be any right or interest, however so called, in a share. "Exempt persons" are those persons who are entitled to deal in shares without being on the proposed register, i.e., brokers on stock exchanges which the Board of Trade has certified have fulfilled certain qualifications. "Transaction of business in shares" means anything done in relation to or purporting to relate to the subscription, underwriting or purchase of shares.

With regard to sub-s. (2) of s. 356, the Committee recommend that every offer made by or on behalf of a company shall be signed by every director, and they also recommend that the doubt mentioned earlier in the report as to whether a catalogue of an auctioneer containing particulars of shares to be sold is a prospectus should be resolved, but they make no further suggestion in which direction this should be done. To clear up the question referred to in my previous article, viz., whether proviso (*b*) of sub-s. (2), misprinted (3) in the appendix to the report, of the section excludes from the operation of the section shares which at some relatively distant date had been allotted or been the subject of an agreement to allot with a view to their being offered for sale to the public, they recommend that at the end of the proviso these words shall be inserted: ". . . and such offer is accompanied by a document complying with ss. 38 or 354 of the Act."

The remaining alterations are aimed at securing increased information being given to intending purchasers, and they also suggest that the penalties imposed by sub-s. (5) shall be increased and that any offence contravening the section may, if so ordered by the court of summary jurisdiction, be tried on indictment.

It will be seen from this and the previous articles that one need not expect any radical changes in the present company law, and that any legislation that may be introduced will affect very little the ordinary affairs of an ordinary limited company. It is perhaps as well, before concluding, to draw my readers' attention to the recommendation that gambling transactions based on the rise and fall in the value of securities or commodities or metals should be deemed to be dealing in stocks and shares, as also should distributing invitations to the public to contribute or to participate in any share or commodity pools.

A Conveyancer's Diary.

[Contributed.]

Vendors' Covenants in Restraint of Trade.

Prior to the *Nordenfelt Case* [1894] A.C. 535, a distinction was believed to exist between general and partial restraints of trade. It was said that a general restraint was necessarily bad, and that therefore, if one had to consider such a restraint there was no need to look at its reasonableness or the reverse, but that a partial restraint would be good if it were reasonable in the circumstances.

This distinction was swept away by the decision of the House of Lords in the *Nordenfelt Case*. The result of their lordships' judgments is that to every covenant in restraint of trade, one must apply two tests: (1) Is it reasonable as between the parties; (2) Is it in the public interest? If it passes both tests, it is enforceable, otherwise it is not. There is no rigid distinction of law between general and partial restraints. Such a distinction does subsist, but it is one of the degree of reasonableness: as Lord Macnaghten suggested (at p. 570), a general restraint is an example of an unreasonable contract.

How, then, is this rather vague doctrine of reasonableness to be applied? I do not wish here to discuss the test of reasonableness in the public interest, which is much the

less important test of the two, and does not figure largely in cases subsequent to the *Nordenfelt Case*.

The first great distinction is between master and servant restraints on the one hand, and those between vendor and purchaser on the other. This distinction is implicit in the judgment of Lord Macnaghten in the *Nordenfelt Case*, but was crystallised in *Mason* v. *Provident Clothing & Supply Co. Ltd.* [1913] A.C. 724, and *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688, which were both decided in the House of Lords. The point of the distinction is that an entirely different standard of reasonableness is applicable to the two cases. It is one thing to enforce a restraint designed effectively to protect a purchaser of a business against the competition of his predecessor. A predecessor who competes is stealing the business he has sold, as Lord Macnaghten put it (*Nordenfelt Case*, at p. 572): "There is a homely proverb current in my part of the country which says you may not 'sell the cow and sup the milk'." It is quite another thing to prevent an employee from earning his living because he leaves his employment. If severe restraints were enforceable against employees, they would really be reduced to a kind of villeinage, since they must stay in the one employment or starve. As Lord Macnaghten said (at p. 566): "There is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment." All that an employer can expect is that his ex-employee shall be prevented from damaging him by taking unfair advantage of the fact of such employment or of information acquired in the course of it. He cannot protect himself against the ex-employee's competition *per se*: *per Younger*, L.J., in *Attwood* v. *Lamont* [1920] 3 K.B., at p. 589. That being so, it is more difficult to establish the reasonableness as between the parties of a master and servant restraint than of one between vendor and purchaser.

How, then, is the reasonableness of restrictions to be established? It is a question to be decided upon evidence in regard to the surrounding circumstances; but it is not a question of fact. The courts "have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the courts as being for the court itself, and to be decided in accordance with a definite legal test. Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and of the employment and, I think, also as to any practice which is usual among business men as regards the terms of the employment:" *per* Viscount Haldane, L.C., in *Mason's Case*, at p. 732. The onus of proof of reasonableness is upon the covenantee: see *per* Atkin and Younger, L.JJ., in *Attwood* v. *Lamont* [1920] 3 K.B. 571, 587.

What, then, is the test to which Lord Haldane refers in the case of a vendor and purchaser covenant? It is that laid down in *British Reinforced Concrete Engineering Co. Ltd.* v. *Schelff* [1921] 2 Ch. 563, by Younger, L.J., sitting in the Chancery Division. The headnote states it thus: "In considering the reasonableness of a covenant in restraint of trade entered into by a vendor on the sale of a business, the court must merely consider whether it was reasonably necessary for the protection of the purchaser in respect of the business sold. The purchaser's existing businesses are not the legitimate subject of this protection and their nature and extent must be disregarded." The sole subject of protection is the business sold. This principle was illustrated by a rather interesting little case recently reported in this journal. The case is *Bates & Co.* v. *Dale* (81 SOL. J. 648). The business sold was a very small accountancy business in Leek, Staffordshire. On the sale the vendor became manager of the purchaser's Leek branch. The purchaser had one of the largest accountancy businesses in the Potteries. The covenant was against the vendor being in any way concerned or interested, whether on his own account or as an employee, in any other accountancy business within fifteen miles of the Town Hall at Leek for fifteen years. If the covenant were enforceable it was clear that it had been infringed, since the defendant had set up an accountancy business in Leek. Clauson, J., pointed out that the fifteen mile radius comprised not only the Potteries, where the purchasers' main business was carried on, but also Buxton and Macclesfield, which were not in the same constellation of places at all; they clearly had not much connection with Leek for the purposes of a business such as that in question. The covenant was unenforceable as being "more than reasonably adequate" to protect the purchasers "as purchasers of this small goodwill." It seems that the purchasers as a very big firm might have suffered from the plaintiff's competition in Buxton or Macclesfield. But as purchasers of the very small Leek business such competition would not harm them, and they were only entitled to protection for the small business.

If a covenant is bad, it is wholly bad, unless it comes within the very strict limits of the doctrine of severance, as laid down by the Court of Appeal in *Attwood* v. *Lamont*, *supra*. As stated by Younger, L.J. (at p. 593) the doctrine makes it permissible to sever a covenant in a case where the covenant is not really a single covenant but a combination of several distinct covenants. "In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only." One must be able to make the severance by the mere deletion of words; with the words deleted, the covenant must still make sense and grammar. One may not insert or alter words to make it make grammar and sense after the deletion. And the question of deletion only arises at all if the covenant in its original form was substantially not one covenant but several. Moreover, as appears lower down the same page, the court need not necessarily sever even if severance is technically permissible.

In *Bates* v. *Dale* the covenant was obviously one which it was not permissible to sever within the *Attwood* v. *Lamont* rules. Therefore it had to be dealt with as it stood, and since it involved the unnecessary restriction in respect of Buxton and Macclesfield it was wholly bad. Consequently, the defendant vendor, who had set up a competing business in Leek itself, and had probably never conceived the idea of going off either to Buxton or Macclesfield, could not be restrained by injunction. The case should be a warning, if warning be needed, to prospective covenantees and their advisers not to grasp at too much and so lose the whole.

Landlord and Tenant Notebook.

Mining Lease: Implied Right to Let Down Surface.

THE oldest record of an action between parties to a lease of land containing coal is, I believe, *Saunder's Case* (1598), 5 Co. Rep. 12a. The claim was for waste in digging seacoals (then the usual name for coal, which came to London by sea). The defence was that the mines were open when the term was assigned to the defendant. Principles were then laid down in a number of resolutions. It was held that a lessee had the right to dig if the mines were open at the time of the grant, for the intention must be that the lessee was to take all profit in the land. If, however, the coal was still included in the bowels of the earth when the lease was made, then a lease of the land did not entitle the grantee to dig; but a lease of the land and mines would have that effect.

Much has, of course, happened in the mining world since the sixteenth century; the Industrial Revolution of the nineteenth century in particular increased the demand for coal, and indirectly occasioned a considerable development of the law relating to the construction of leases of mines. One

consequently recurring question was whether words used in a mining lease which, unlike the instrument referred to in *Saunder's Case*, granted coal but not land, conferred a right to let down the surface.

The most useful authority on this point is, I think, the decision in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.* [1910] A.C. 381, and it will be seen that however remote, in point of time and otherwise, that case may be from *Saunder's Case*, both apply an important general principle of construction and illustrate the lengths to which a court may go in implying meanings not only from words but from outside facts.

Before discussing the authority in question it may be useful to refer to the case of *Butterknowle Colliery Co. Ltd.* v. *Bishop Auckland Industrial Co-operative Co. Ltd.* [1906] A.C. 305. The essential issue was whether a particular Inclosure Act entitled the lord of the manor, who before the statute was passed had enjoyed the right to work mines and let down the surface as long as sufficient pasturage was left, to continue to do so on payment of compensation. The difficulty was that one clause conferred upon the lords of the manor the right to work minerals "as fully and freely as they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing," while the next clause provided for the recovery of damages by any person whose allotment suffered in consequence of the mining operations. Stating the general principle, Lord Macnaghten said that to exclude the presumption that the surface owner was entitled to support it was not enough that mining rights should be reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants should be conferred without stint, or that compensation should be provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Also that it would not be enough in the case of a lease that the lessee should be bound to work out the minerals in a prescribed manner.

The passage cited above appears to me to be the one which wrongly influenced the court of first instance in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.*, an action between the lessees of two different seams of coal, that of the appellants overlying the seam granted to the respondents. The appellants' was the earlier lease, and it reserved the right to grant a lease of the lower seam subject to a covenant of indemnity.

So much for the actual words; but what became of vital importance in construing them was that evidence was heard of the practice of mining from which it appeared that the parties must have contemplated contemporaneous working; also that the proper mode of working the underlying seam would be by the "long-wall" system; and that such working would necessarily cause subsidence in the overlying seam.

The decision of Neville, J., at first instance was based, as mentioned, upon the learned judge's view of the effect of Lord Macnaghten's judgment in the *Butterknowle Case*, and I think that the part which I paraphrased above must have exercised most influence; but when Lord Macnaghten delivered judgment in the *Butterley Case*, upholding the reversal of Neville, J., by the Court of Appeal, his lordship observed that with the utmost respect to Neville, J., he was at a loss to conceive what the learned judge was referring to. His lordship also rejected a hypothesis of Lord Halsbury, L.C., on the point.

Such speculation is, however, of no practical interest, and to come to the *ratio decidendi* of the *Butterley Case*, I should say it is best expressed in Lord Halsbury's judgment in the following words: "Business men familiar with the subject and knowing what they were talking about have used language which necessarily imports that both sets of seams were to be worked; and as this essentially business document was drawn up for business purposes and for valuable consideration, it is intended that they should be worked." Essentially, this utterance rests upon the same basis as the judicial resolutions in the sixteenth century *Saunder's Case*.

True, since the above decision the same tribunal has, in *Tredegar* v. *Harwood* [1929] A.C. 72, registered an important protest against what Lord Shaw of Dunfermline called "this process of piling implication upon implication," and it is well that practitioners drafting leases should have regard to the limits of the rule. But when dealing with a question of support, the common law right may be displaced, as Lord Macnaghten pointed out in the *Butterley Case*, either by express permission or by clear implication; and while what was clear to one mind might not be clear to another, it was difficult to imagine a case in which the right to withdraw support could be more clearly implied than in that case.

A lessee whose lease does not permit him to withdraw such support may now be in a position to obtain the right under the Mines (Working Facilities and Support) Act, 1923, s. 3 (1) and (2) (*a*). "May" because by virtue of s. 6 of that statute he will, apart from the matter of paying for the right, have to satisfy the Railway and Canal Commission that it is expedient "in the national interest" that the right should be granted to him. And, so far, we have very little authority on the question of national interest, the nature of which appears to be as arguable as the better known "public policy."

Our County Court Letter.

LIABILITY FOR TRESPASSING HORSES.

In *Taylor* v. *Pool*, recently heard at Coventry County Court, the claim was for damages for negligence. The plaintiff's case was that, having rented a field from the defendant, he placed in it a pony, which he used in his business of a poultry and pig farmer. The defendant owned a horse and a mare, which, having broken through from a neighbouring field, attacked the pony and broke its leg and ribs by kicking. The items claimed were £1 8s. for four weeks' hire of a motor car and £10 for the value of the pony, which had been destroyed. A submission was made that, as the action was not for trespass, but for negligence, of which there was no evidence, there was no case to answer. The submission was overruled, and the defendant's case was that his fences were good, and none of his horses had escaped before, although one of the plaintiff's cows had been in his field. The mare and gelding were about fifteen years old, and it was common knowledge that horses objected to newcomers. His Honour Judge Hurst gave judgment for the plaintiff for £8 18s. with costs. Compare *Manton* v. *Brocklebank* [1923] 2 K.B. 212, in which the leading cases on this subject were discussed.

THE SCOPE OF IMMIGRATION REGULATIONS.

In *O'Donnell* v. *London and North Eastern Railway Co.*, recently heard at Hull County Court, the claim was for £100 as damages for breach of contract. The plaintiff's case was that, having obtained a contract to teach English at Hamburg, he took a ticket from Grimsby. After mentioning to the booking clerk, in conversation, that he only had 11s. left, the plaintiff went on board the ship, where he had another interview with the booking clerk. The latter pointed out that the German regulations required persons landing to have £2, to which the plaintiff replied that his employers would meet him with money. Nevertheless the plaintiff was not allowed to travel, and his passage money was refunded. The result was that he lost his situation and had since been unemployed, although it had transpired that he could have landed in Germany. The defendants' case was that the amount claimed was excessive, and £12 had been paid into court. His Honour

Judge Sir Reginald Mitchell Banks, K.C., held that the defendants should have apologised and made an offer. Judgment was given for the plaintiff for £30 and costs.

THE SCOPE OF HOUSING REGULATIONS.

In *Snowdon and Sons* v. *Herman*, recently heard at Sunderland County Court, the claim was for £31 15s. as the cost of repairs to property. The counter-claim was for £26 7s. 6d. for loss of rent caused by defective work. The plaintiffs' case was that the property had been the subject of a demolition order, which was withheld on the defendant undertaking to do repairs. A stipulation of the local authority was that a stoothing wall was necessary, but the defendant instructed the plaintiffs to instal a wooden partition instead, taking the risk of it not being passed. The local authority, however, did not pass the house as fit for habitation. His Honour Judge Richardson observed that the defendant's failure to let the house was his own fault, and could not be attributed to the plaintiffs. Judgment was given in their favour on the claim and counter-claim, with costs.

FLAT-DWELLERS AND TENNIS COURTS.

In a recent case in the Liverpool Court of Passage (*Shipton* v. *Patrick*) the claim was for damages for breach of contract. The plaintiff's case was that he agreed to take the tenancy of a flat for two years at a rent of £160 a year. The defendant landlady agreed to equip completely the tennis court in the garden, but no side nets were fitted and the balls had to be retrieved from shrubberies and a drain, to the detriment of the players' clothing. The defence was that the provision of end nets was sufficient, but evidence from a sports outfitter was called by the plaintiff, to the effect that private courts in gardens were invariably supplied with side nets. The presiding judge, Sir W. F. K. Taylor, K.C., held that there had been a breach of the agreement, and judgment was given for the lowest quotation for side nets, viz., £9, with costs.

RECENT DECISIONS UNDER THE WORKMEN'S COMPENSATION ACTS.

EXTENT OF EARNING CAPACITY.

In *Yearlsey* v. *Madeley Collieries Ltd.*, at Newcastle-under-Lyme County Court, the applicant's case was that, while working in the mine, he was struck by a fall of coal from the roof. Full compensation at £1 8s. 6d. a week was paid until the 8th July, 1936, when he returned to work. On the 15th August, 1936, he again ceased work, and was still in receipt of 15s. a week for partial incapacity. His case was that the amount should be increased to £1 1s. a week, as the respondents could not find him suitable light work. The respondent's case was that there was nothing physically wrong with the applicant, and they could employ him in the unloading of coal waggons, though this was admittedly hard work after a year's unemployment. His Honour Deputy Judge Burne held that the applicant had not entirely recovered, but he had had working capacity when he ceased work, and still had an earning capacity of £1 7s. a week. The applicant was not shirking work, but he had brooded over the injury, and thought he was incapable of making the effort which was really within his power. An award was made of 15s. a week, without costs.

NYSTAGMUS AND LIGHT WORK.

In *Hancox* v. *Nook and Wyrley Collieries Ltd.*, at Walsall County Court, the applicant's case was that he was certified as suffering from nystagmus on the 24th September, 1936. Compensation at £1 1s. 5d. a week was paid from the 1st to the 17th October, 1936, since when he had been paid 3s. 6d. a week only. The respondents had offered him light work, viz., cutting nettles and hoeing potatoes, but he could not do work which involved stooping or bending forward, as this caused him to become giddy and fall down. The respondents' case was that the applicant had been able to do the work offered, which was still available, at 30s. a week, but he would prefer a lump sum. There was a conflict of medical evidence, and His Honour Judge Tebbs observed that the applicant's own doctor, who had given him certificates, had not been called. Evidence on the applicant's behalf had been given by a doctor who first saw him two days before the hearing. An award was made in accordance with the submission of the respondents, i.e., 3s. 6d. a week.

PARTIAL INCAPACITY OF GROOM.

In *Dean* v. *Fincham*, at Lincoln County Court, the applicant's case was that on the 9th September, 1936, he had been breaking in the respondent's horse, which shied at a steam roller and fell into a dyke. In rising, the horse kicked the applicant's instep, so that he was still unable to ride, owing to the pressure of the stirrup iron. After the accident, his wages of £2 a week were paid until the end of October, 1936, but he was then dismissed, and had earned nothing until March, 1937, when he became an officer's servant at £1 18s. 3d. a week. The respondent's case was that the horse was four years old, and required no breaking in. The applicant had recovered from the accident, but, although he only had one horse to look after, he objected to work and was dismissed. The medical evidence was that the applicant was not fit for riding but could do general labouring. His Honour Judge Langman awarded 11s. 2d. a week for partial incapacity from the 8th November, 1936, to the 19th February, 1937, with a declaration of liability.

LUMP SUM FOR INJURY TO NECK.

In *Worlidge* v. *Rice and Son, Ltd.*, at Canterbury County Court, the applicant had wrenched his neck, when unloading cement, and was still attending hospital three times a week for electrical treatment. It was common ground that the applicant would be fit for work in two months, although he would always have something to remind him of the accident. The sum of £100 had been agreed in settlement, but His Honour Judge Clements refused to record the agreement, on the ground that £300 would be a suitable amount.

Obituary.

SIR ARTHUR OLIVER.

Sir Arthur Maule Oliver, M.A., O.B.E., solicitor, Town Clerk of Newcastle-upon-Tyne, died at Bamburgh on Monday, 6th September, at the age of sixty-six. He was educated at Eastbourne College, and was admitted a solicitor in 1896. He was appointed Town Clerk of Newcastle in 1907, and in 1915 he became Clerk of the Peace. He was made O.B.E. in 1919. He was president of the Society of Borough Clerks of the Peace in 1929, president of the Newcastle Law Society in 1930–31, and chairman of the Law Committee of the Association of Municipal Corporations from 1933 to 1935. In 1935 he received the honour of knighthood. Sir Arthur Oliver was joint author of Hill and Oliver's book on the Local Government Act, 1929.

MR. G. A. DIXON.

Mr. George Anthony Dixon, retired solicitor, of Hexham, died on Tuesday, 31st August, at the age of seventy-eight. Mr. Dixon served his articles with Messrs. L. C. & H. K. Lockhart, of Hexham, and was admitted a solicitor in 1884.

MR. H. FORD.

Mr. Henry Ford, solicitor, senior partner in the firm of Messrs. Ford, Harris, Ford & Simey, of Exeter, died at Exmouth on Monday, 30th August, at the age of sixty-nine. Mr. Ford was educated at Chard Grammar School, and

served his articles with his uncle, Mr. H. Ford, of the firm of H. & B. J. Ford. He was admitted a solicitor in 1889, and on the death of his uncle, Mr. B. J. Ford, he became a partner in the firm in 1895, it then being known as Ford, Harris & Ford. He had been Under-Sheriff for the County of Devon since 1896, and Clerk to the Lord-Lieutenant of Devon since 1906.

MR. T. L. LOCKING.

Mr. Thomas Lomas Locking, solicitor, senior partner in the firm of Messrs. Locking & Locking, of Hull and Cottingham, died at Cottingham on Sunday, 5th September, at the age of eighty-four. Mr. Locking was admitted a solicitor in 1882. He was Clerk to the Justices of the South Hunsley Beacon Division for many years, and he was a former President of the Hull Law Society.

MR. E. J. STOKES.

Mr. Edward John Stokes, retired solicitor, of Serjeants' Inn, E.C., died in London on Tuesday, 7th September, at the age of eighty-one. Mr. Stokes was admitted a solicitor in 1887.

Correspondence.

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL.*]*

Intestacy: The Widow's £1,000.

Sir,—The article by your contributor, p. 643 of THE SOLICITOR'S JOURNAL for the 7th August, does not deal with one point in regard to the widow's £1,000. Interest is payable on the £1,000 at 5 per cent. per annum from the date of death until payment. I shall be interested to have your views on whether income-tax should be deducted from this interest on the ground that it is in the nature of income, or whether because the interest is paid out of capital and would not recur after the £1,000 has been paid, no tax is payable.

Outer Temple, W.C.2. JOHN BURDER.
31st August.

[This letter has been shown to the contributor of the article in question, and his reply is as follows: "I have not any doubt but that tax should be deducted from the interest on the widow's £1,000. Such interest is, in my opinion, charged under Case III of Sched. D, which charges 'interest of money, annuities and other annual profits or gains not charged under Scheds. A, B, C and E, and not specially exempted from tax.' This interest is undoubtedly 'interest of money,' and is paid because the £1,000 is due and unpaid. It is not comparable to an award of a sum of damages which includes interest. That it is payable out of capital is immaterial; what matters is that it is clearly income in the hands of the recipient. Similarly, an annuity which is paid wholly or partly out of capital is always chargeable. I do not know of a direct authority in the A.E.A., but I do not think a valid distinction could be drawn between this case and that of Scottish *jus relictæ*, interest on which is chargeable: *Sweet* v. *Macdiarmid*, 7 Tax Cas. 640.—ED., *Sol. J.*]

Appropriations in Balance Sheets.

Sir,—I observe in the "Accountant" for 14th August, a letter under the above heading, the writer commenting on the "growing tendency to give effect to proposed Appropriations of Profits in Balance Sheets for submission to Annual Meetings at which these Balance Sheets and proposals are to be approved," and he asks whether this is in order in view of s. 123 of the Companies Act 1929.

This section requires directors to lay before the company in general meeting a balance sheet as at the date to which the profit and loss account is made up. This balance sheet should not, strictly speaking, show how it is proposed to deal with the profit which has been made. This is, after all, a matter which ultimately is to be decided by the shareholders themselves: the section specially providing that the directors' proposals with regard to the amounts to be paid as dividend and to be carried to reserve, should be shown in a report to be attached to the balance sheet.

Ordinary dividends, apart from interim dividends, cannot normally be paid except by authority of the company in general meeting and it is evident that s. 123 was framed with an eye on this requirement. The effect, however, of the practice to which the letter referred to draws attention is—

(1) That the directors' proposals with regard to dividends, etc., are given effect to in the balance sheet before they receive the approval which is the pre-requisite to their incorporation in the balance sheet, and

(2) that the balance sheet so made out is not made out, as s. 123 requires, "as at the date to which the Profit and Loss Account is made up." A profit and loss account is really made up to the end of a particular year's trading. A balance sheet by including the proposed appropriations becomes a document of which it is difficult to say that it is made up to any definite date at all.

There is, of course, an obvious convenience in this procedure, but there appears to be a technical breach of the Statute which might result in real practical difficulties. If, for instance, the annual meeting failed or refused to pass the directors' report a fresh balance sheet would, presumably, be necessary. Apart from this there is the question whether, in framing the balance sheet in this way, the shareholders receive the full information which they are entitled to, inasmuch as in inserting the proposed appropriations the actual amount at credit of profit and loss account is not shown on the balance sheet.

I should be very interested to have your readers' views on this point, especially as the matter is, after all, a legal one.

3rd September. J. H. C.

Reviews.

The Education Act, 1936. By The Hon. HENRY HOPE, Barrister-at-law, Middle Temple. 1936. Demy 8vo. pp. vii, and (with Index) 179. London: Eyre & Spottiswoode (Publishers), Ltd. 12s. 6d. net.

This is an exemplary work on which the treatment of other departmental measures ought to be modelled. It begins with an exhaustive introduction, deals in detail with the provisions of the Act, and ends up with a number of useful Appendices. The author evinces a sound knowledge of the political and economic background of the Act. He seems to have carefully studied the Parliamentary debates and discussions, together with the comments and criticisms published in the educational press. The result of his conscientious and painstaking labour is a book indispensable to those called upon to administer the Act, which it is impossible to praise too highly.

Books Received.

ABC of County Court Practice. By CEDRIC H. AKASTER, Solicitor of the Supreme Court, and F. W. BROADGATE. 1937. Crown 8vo. pp. xvii and 362. London: Sir Isaac Pitman & Sons, Ltd. 12s. 6d.

The Settled Land Acts. By J. C. ARNOLD, LL.B., of the Inner Temple, Barrister-at-Law. 1937. Royal 8vo. pp. xxiii and (with Index) 384. London: Sir Isaac Pitman & Sons, Ltd. 25s. net.

POINTS IN PRACTICE.

Questions from Solicitors who are Registered Annual Subscribers only are answered, and without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the Staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 29-31, Breams Buildings, E.C.4, and contain the name and address of the Subscriber. In matters of urgency answers will be forwarded by post if a stamped addressed envelope is enclosed.

Apportionment of Administration Expenses.

Q. 3487. A testator by his will devised to each of his five children certain real property and, subject to such devises, the testator devised all his real estate and bequeathed his personal estate unto his trustees upon trust for sale and conversion and to pay thereout his debts, funeral and testamentary expenses and to stand possessed of the residue upon trust for his six children (including the five devisees referred to). The specific devises of realty comprised the whole of the testator's real estate, the residue consisting of pure personalty. Considerable legal charges and surveyors fees were incurred in connection with (1) the valuation of the realty for estate duty purposes, and (2) the assents to the devisees and abstracts of title in cases where such devisees cannot have possession of the deeds. The point has been raised as to whether, in spite of the direction in the will, such costs, or any part of them, must or can be charged against the respective devisees, or whether they must be paid out of the residue although consisting of pure personalty. Opinions Nos. 1058, 1069, 1076 and 1196 in The Law Society's "Law, Practice and Usage," 1923, seem to indicate that the latter course is the correct one, but the case of *In re Betts*: *Doughty* v. *Walker*, 2 Ch. [1907] 149, appears to conflict, and your opinion is desired.

A. So far as can be seen, there is no reason why the "equity" rule laid down in the case of *In re Betts: Doughty* v. *Walker* [1907] 2 Ch. 149, should not continue to be applied. It appears, as stated by the subscriber, that the opinions expressed by The Law Society conflict with the decision in this case, but it must be borne in mind (A) that they are expressions of opinion on the strictly legal position, whilst the Betts decision was based on equitable considerations, and (B) that the opinions of The Law Society were expressed before the Betts decision was delivered. Subsequent enactments do not affect the principle laid down in the Betts decision which, apparently, should be applied in the present instance, notwithstanding the directions in the will. Referring to this point, the learned judge observed that "I suppose there might be a direction to override it (the general rule), but what I take the meaning of the decision (the decision in *Patching* v. *Barnett*, 51 L.J. Ch. 74) to be is that the direction must be so plain as to show that the testator intended to depart from the general rule." The directions in the will in the present case are, apparently, no more specific than in the *Betts Case*.

Tenancy of Cottage.

Q. 3488. A large estate was originally leased to A, who carried on the business of farming, and on such land was a cottage which was let to B on a service tenancy at a rental of four shillings per week. In 1922, A purchased the estate and B continued his existing tenancy at the same rental. In 1932, A sold the estate to C, and C in 1936 sold a portion of the estate upon which the cottage is erected to D. D is developing the estate by erecting houses thereon, and to complete such development it is essential that possession of the cottage be obtained, but B, who has had possession for the past thirty-four years and has paid a weekly rental of four shillings up to the 6th December, 1935, claims that he has the protection of the Rent Acts.

(1) Has B the protection of the Rent and Mortgage Interest Restrictions Acts?

(2) Was the service tenancy determined on the sale by A to C in 1932?

(3) Did a new weekly decontrolled tenancy commence when C purchased in 1932?

(4) Is not B liable to pay an increased rental on the determination of his service, and, in any event, an increase of forty per cent. on the "standard rent" from a certain date?

(5) From what date can D claim such increase of rent?

A. (1) B has the protection of the Rent and Mortgage Interest Restrictions Acts.

(2) Yes, if C was not a farmer employing B.

(3) A new weekly tenancy commenced when C purchased in 1932. The cottage was not decontrolled, however, as the landlord never had possession.

(4) B is liable to pay an increased rent, based on forty per cent. above the standard rent, but only if and when a statutory notice of increase is served.

(5) Not from any past date, but only from a future date, as specified in the statutory notice.

Deduction of Income Tax in Actions.

Q. 3489. (1) When suing for the recovery of: (i) Rent in arrear; (ii) Interest due under a mortgage or other deed; (iii) Interest due on a bill of exchange or promissory note; (iv) Any annuity; (v) Any other periodical payment, should the statement of claim or summons show the deductions of income tax on the amounts sued for?

(2) In the event of the plaintiff omitting to deduct income tax and signing judgment in default of appearance or defence or otherwise, for the full amount, would the defendant have a right to have the judgment amended or set aside?

If so, who would be liable for the costs thus incurred and the costs and sheriff's charges relating to the execution in the event of an execution having been issued or levied?

(3) Would the plaintiff be correct in making an affidavit under Ord. 14 or any other affidavit claiming the full amount without deduction of tax, or in swearing to a bankruptcy or winding up petition or proof in bankruptcy or winding up for the full amount without deduction of tax?

A. (1) The answer to this question is in the negative. The plaintiff in the circumstances named would be entitled, under the document upon which he is suing, to receive the interest reserved by that document, and he would not be concerned with any liability of the defendant to account to the revenue authorities for income tax in respect of such payments. Provision for the deduction of income tax from rent or other payments is contained in the Income Tax Acts, and the rules relating thereto do not come into operation until *payment*. The rules are so designed that the payer of such sums may or must apportion them, as the case may be, between the recipient and the revenue authorities, but the gross amount is the sum to which the former is entitled. Hence, he may sue for that sum, and it will be for the payer to allocate the amount between the plaintiff and the revenue authorities when payment is, in fact, made. The defendant might not be bound or entitled to deduct tax from some of the items mentioned by the subscriber, but that question would depend on the particular circumstances of the case, and does not affect the point in issue.

(2) The answer is again in the negative. The plaintiff is entitled to the amount reserved in the instrument under which he is suing, and it will be for the defendant to see that his liability to the revenue authorities is taken into account when the judgment is drawn. If the amount is received by the plaintiff in full, he must make a return thereof to the authorities, and pay the tax appropriate thereto.

(3) The plaintiff would be quite in order in making an affidavit under Ord. 14, or swearing to a bankruptcy or winding up petition in respect of the gross amount of the outstanding debt, for the same reason as stated above.

Superannuation Fund of Company.

Q. 3490. A company has established a superannuation fund to which not only ordinary employees but also executive directors contribute, and pensions are actually payable to retired executive directors pursuant to the scheme. The objects clause contains no express power to establish any such scheme, but in view of *Hutton* v. *West Cork Railway Co.* (1883), 23 Ch., it is apprehended that the scheme is within the powers of the company as regards ordinary employees. Your advice is sought whether it is *ultra vires* for executive directors to contribute and benefit. They are employees, and probably no doubt would arise if they were not also directors. If, in your opinion, directors ought to be excluded from such a scheme, is there any way of overcoming the difficulty except by taking the necessary power by altering the memorandum of association, with the expense of obtaining the approval of the court ?

A. It is *ultra vires* for the executive directors to contribute and receive benefit. See *In re Lee Behrens & Co. Ltd.* [1932] 2 Ch. 46. A distinction may be drawn between that and the present case, in which the scheme is contributory, so that consideration moves from the directors. The scheme is also for the benefit of directors, and not their widows, as in the case above cited. Even if the company approved the present scheme in general meeting, it is doubtful whether it would be held *intra vires*. Directors ought therefore to be excluded from the scheme, and there is no way of overcoming the difficulty, except by altering the memorandum of association and incurring the expense of obtaining the approval of the court.

Sale by Receiver.

Q. 3491. Is a receiver and manager, appointed by virtue of a debenture giving him power of sale, in order in selling the whole of the assets of the company to satisfy his debentures after he has been carrying on the business for over twelve months and has then received notice of a petition to wind up the company ? It is believed that the sale price of the whole of the company's assets will be about sufficient only to satisfy the receiver's creditors and pay the debenture-holders their capital and interest. Furthermore, in the event of such sale, should the conveying party be expressed to be the company, and in what form should the testimonium and execution be ? It is assumed that the agreement for sale may be signed by the receiver and manager for and on behalf of the company.

A. The receiver and manager should not sell the whole of the assets, in view of the impending petition for winding up the company. The debenture-holder should apply in the liquidation for the appointment of his own receiver as receiver and liquidator. See *British Linen Co.* v. *South American and Mexican Co.* [1894] 1 Ch. 108. In the event of such sale the conveying party should be expressed to be the company. The agreement for sale may be signed (assuming that the court confirms the appointment) by the receiver and manager for and on behalf of the company. The testimonium and attestation clause will be : In witness whereof the said X as such receiver [and liquidator] as aforesaid has affixed the common seal of the said company hereto and the other parties hereto have hereunto set their respective hands and seals the day and year first before written.

To-day and Yesterday.

LEGAL CALENDAR.

6 SEPTEMBER.—Mr. Baron Lloyd had little chance to develop his talents in the public service. At the Bar a change of ministry took the Solicitor-Generalship out of his hands after only a couple of years, and he had to wait three more before he was raised to the Bench. His place there he enjoyed for only two years, dying suddenly at Northallerton on the 6th September, 1759, on his return from the Northern Circuit. He was one of a remarkable group of judges produced about this time by the Lichfield Grammar School, Willes, C.J., Wilmott, C.J., Parker, C.B., and Noel, J.

7 SEPTEMBER.—Sir Henry le Scrope was one of the great judges of the middle ages. From 1308 onwards for twenty-eight years he served almost continuously on the Bench, as Justice of the Common Pleas, as Chief Justice of the King's Bench, and finally as Chief Baron of the Exchequer. He died on the 7th September, 1336, and was buried in the abbey at Easby in Yorkshire, which he had founded. His brother Geoffrey likewise attained the position of Chief Justice, and his son Richard became Lord Chancellor.

8 SEPTEMBER.—Mr. Justice Denison, who was appointed a Justice of the King's Bench in 1741 and served with learning and ability for over twenty-three years, was a Yorkshireman, the son of an opulent merchant of Leeds. During the long period as a judge, he saw three Chief Justices preside over his court. Failing health and weakening eyesight compelled his resignation in 1765, and on the 8th September in the following year he died. He was buried near Chief Justice Gascoigne in the church at Harewood, and Lord Mansfield composed his epitaph.

9 SEPTEMBER.—Robert de Braybroke, Bishop of London, was Chancellor for a short time in the reign of Richard II being appointed on the 9th September, 1382, and resigning in the following March, but he is less notable for any legal distinction than for his attempt to vindicate the sanctity of St. Paul's by threatening excommunication of any who bought and sold or played ball within the Cathedral precincts or shot the birds who nested in the roof. When his coffin was broken in the Great Fire of London his body was found in a perfect state of preservation.

10 SEPTEMBER.—On the 10th September, 1864, Leeds, recently elevated to the rank of an assize town, enjoyed the spectacle of its first executions, eighty thousand persons gathering to see two murderers hanged in front of the gaol. We are told that "though there were many improprieties as might be expected among so great a gathering of persons, at the actual time of the execution as much good order and decorum were shewn as could be expected." At the last moment one prisoner, turning to the other, asked : "Ah, lad, art thou happy ?" The other replied : "Indeed, lad, I am." Then the drop fell.

11 SEPTEMBER.—On the 11th September, 1712, John Hamilton, a gentleman, whom several persons of quality deposed to be "a very honest, gallant, inoffensive man," was tried on a charge of murder, it being alleged that he had acted as second in a tragic duel, fought in Hyde Park, in which the Duke of Hamilton and the dissolute young Lord Mohun had killed each other. The prisoner, who pleaded that he had accompanied the Duke who had asked him to go to the Park with him, but that till he came to the field he did not know what was afoot, got off with a verdict of manslaughter.

12 SEPTEMBER.—On the 12th September, 1793, the Rev. Thomas Fyshe Palmer, was tried at Perth on a charge of sedition. He was convicted.

THE WEEK'S PERSONALITY.

Thomas Fyshe Palmer was by no means the sort of person who would in normal times have found himself accused of being a revolutionary. Educated at Eton and Cambridge, he had before him brilliant prospects in the Church of England, which he resigned to become a Unitarian minister in Scotland, his sermons attracting the attention of literary circles in Edinburgh. One day to his misfortune he was induced to attend a meeting of a working men's society called "The Friends of Liberty," and there a weaver of Dundee brought forward a rather violent address to the public which he proposed to circulate as a handbill. Although he was opposed to its publication, Palmer was unfortunately kind enough to tone down the expressions a little and correct the grammar. He also ordered a thousand copies to be printed. That was rash. The French Revolution was raging; the King had just been executed and the English government smelling a subversive movement in "The Friends of Liberty" prosecuted Palmer as a revolutionary leader. With Lord Eskgrove on the Bench he had no chance and so the unhappy divine was sentenced to seven years transportation for a document which in effect was no more than a protest against the extravagant war taxation and a plan for universal suffrage and short parliaments. After many sufferings and indignities he reached Australia, which he found: "the finest country I ever saw." He was well treated there but died on the way home.

ATTACK ON THE DOCK.

In a paper read at the Summer School of the Howard League for Penal Reform, Mr. A. H. Lieck attacked, amongst other cherished traditions of the law, the existence of the dock, describing it as "a relic of barbarism" and "an anachronism" It was probably the dawn of such an enlightened sentiment which in 1750 brought about the decree that at the Old Bailey not more than fifteen prisoners should be in the dock at once. The late Lord Darling very amusingly estimated the effect that the prisoner's surroundings had on the well-known presumption of his innocence: "Everyone knows that if there be a reasonable doubt whether a prisoner be guilty or not, he must be acquitted, whereas no such concession is made to a defendant in a civil action. It might well, then, be imagined that more verdicts would be gained by prisoners than by defendants, but they who think thus have failed to notice that it is more important to look innocent than to be *primâ facie* thought so. No defendant is brought up through a hole in the floor; he is not surrounded by a barrier nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged and his latest address is not presumably the gaol of his county."

THE LEGAL MYSTERY.

Mr. Lieck also had words of disapproval for what he declared was the absurd way of wrapping things up that lawyers have. Therein he echoes an old cry oft repeated. Take, for instance, the 1672 version from "The Practice Unfolded," which warns counsel to see that their pleadings "be not stuffed with repetition of deeds, writings or records *in haec verba*, but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless traverses of points not traversible, tautologies, multiplications of words or other impertinences, occasioning needless prolixity that the ancient brevity, succinctness in bills and other pleadings may be restored and observed." An amusing little passage is to be found in the judgment of Knight Bruce, L.J., in *In re the German Mining Co.*, where, having summed up the facts in ten lines, he says: "This is the whole case, as it appears to me, spread as it has been and as lawyers do spread it and as lawyers sometimes cannot help spreading it, over a multitude of sheets of paper."

Notes of Cases.

House of Lords.

A/S Rendal *v.* Arcos, Ltd.

Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham. 19th July, 1937.

SHIPPING—CHARTER-PARTY—ICE CLAUSE—BREACH—NOTICE OF CLAIM—FORM—NOTICE TO AGENT—EVIDENCE THAT NOTICE TO PRINCIPAL.

Appeal from a decision of the Court of Appeal.

In December, 1930, a charter-party was entered into, expressed to be between the appellants, as owners of the Norwegian steamship "Rendal," and the respondents, Arcos, Limited (for Exportles, Moscow), of London, as charterers. The charter-party, which was in the common form described as the Chamber of Shipping Baltic Wood Charter, 1926, was for the carriage of a cargo of pulpwood from Leningrad to Sarpsborg (Norway). The vessel loaded her cargo and arrived at Sarpsborg in February, 1931, whereupon the owners' agents gave the Russian trade delegation in Norway (as agents for the shippers, Exportles), notice of a claim under the ice clause in the charter-party. It was agreed between the owners' agents and the delegation that the latter should deposit £1,532 in a Norwegian bank in joint names. The owners' claim under the ice clause included claims for loss of time, extra coal consumption, extra replenishment of bunkers, and claims for damage to the ship for want of proper ice-breaker assistance which the charterers were bound to supply. In an action by the appellants against the respondents for damages for breach of the charter-party, and the damage to the ship during the voyage, Goddard, J., awarded them £2,495. The Court of Appeal reversed that decision.

LORD WRIGHT said that the appeal raised questions of some general importance on the construction of a common clause in charter-parties, and also on what was sufficient evidence to found the inference that notice to an agent was notice to the principal. Clause 24 of the charter-party provided: "Notice of any claim under this charter or under any bill of lading given hereunder must be given within twelve months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived." The main defence raised in the action was that notice of the claim was not given in accordance with the requirements of cl. 24. Goddard, J., had held that that objection failed, but the Court of Appeal had held that it ought to prevail. Clause 24 required "notice of claim." That, in his (his lordship's) opinion, did not mean a precisely formulated claim with full details, but it must be such a notice as would enable the party to whom it was given to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose. Thus, in the present case, there was a general claim for damages for breach of the ice clause, with particulars, so far as damages were claimed, in respect of delay and consequent expenses. The further claim for damage to the ship herself was a claim in respect of the same cause of action, that was, breach of the ice clause, but it involved different issues of fact—estimates of damage, ship surveys, repair accounts, and so forth. Clause 24, therefore, required a separate notice in respect of such a claim if the purpose of the cl. 24 was to be fulfilled. The clause did not specify to whom notice was to be given. That must obviously depend on circumstances. The shipowner might have claims against the charterers or bill of lading holders or shippers, and the notice would have to be given accordingly. The person to whom notice was to be given must be the person against whom the claim was to be made, or, if he were an agent, his principal or the person ultimately liable and capable of acting on the notice. He (his lordship) held that, contrary to the opinion

of the Court of Appeal, there had been a notice of claim within cl. 24. The second question was whether the notice given to the delegation was a notice to Exportles, notice to them being in this case admitted to be sufficient. There was evidence that the delegation were agents to receive the notice. If evidence was scanty, that was the affair of the respondents, who could have attempted by evidence or correspondence to negative the existence of the alleged agency. No doubt they were not bound to do so. The onus was on the appellants to prove their case. But if they had produced material which, fairly considered in the light of all the proved circumstances, justified the inference of agency, and if the respondents did not seek to displace that inference by the evidence, which, if it existed, could only be produced by them, then, according to the general rule applicable in such circumstances, the appellants had established their case.

It followed from all these considerations that the appeal must be allowed.

The other noble lords agreed.

COUNSEL: *C. T. Le Quesne*, K.C., *Cyril Miller*, and *Richard Hurst* for the appellants; *D. N. Pritt*, K.C., and *Harry Atkins* for the respondents.

SOLICITORS: *Sinclair, Roche and Temperley*; *Middleton, Lewis and Clarke.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

High Court—Chancery Division.

Andrews *v.* River Thames Conservators.

Crossman, J. 14th July, 1937.

SUPERANNUATION—OFFICERS OF RIVER THAMES CONSERVATORS—PLACED ON ESTABLISHED STAFF IN 1930—WHETHER ENTITLED TO PENSION BENEFITS—LAND DRAINAGE ACT (21 & 22 Geo. 5, c. 44), s. 79 (8).

Certain officers and servants of the River Thames Conservators were placed on the established staff or in the regular class of employees since the 1st August, 1930. They now claimed to be entitled to superannuation benefit under s. 79 (8) of the Land Drainage Act, 1930, which came into force on the 31st July, 1930, contending that as the sub-section did not specifically exclude officers or servants placed on the established staff since the coming into force of the Act, their exclusion should not be read into it.

CROSSMAN, J., in giving judgment, said that the sub-section only applied to officers and servants in the employment of the Conservators when the Act came into force. The action must be dismissed.

COUNSEL: *Roxburgh*, K.C., and *Simes*; *Morton*, K.C., and *Rimmer.*

SOLICITORS: *J. M. McDonnell, Jackson & Co.*; *George Glass Corble.*

[Reported by FRANCIS H. COWPER, Esq., Barrister-at-Law.]

High Court—King's Bench Division.

Corbett *v.* Inland Revenue Commissioners.

Lawrence, J. 29th July, 1937.

REVENUE—SUR-TAX—RESIDUARY LIFE TENANT—SUMS RECEIVED DURING PERIOD OF ADMINISTRATION OF ESTATE—WHETHER LIABLE TO SUR-TAX.

Appeal by case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

A testator died in April, 1934, having devised his residuary estate to a daughter for life with remainder to her children. The residuary account of the estate was made up as at 7th May, 1935, the earliest date possible. The sum of £13,600 was placed to the daughter's credit before that date, and appeared in a balance sheet and income account of the estate as at 5th April, 1935. That sum, with the appropriate addition of income tax, amounted to the £17,073 included in the assessment under appeal. The daughter's husband, having been assessed to sur-tax in an amount which included the £17,073 in question, appealed against the assessment. It was contended for the appellant that the residue of the testator's estate was not ascertained before the 7th May, 1935; that, before the ascertainment of the residue, no income within the meaning of the Income Tax Acts arose or accrued to Mrs. Corbett from the testator's estate; and that therefore the assessment appealed against was excessive by £17,073. It was contended for the respondents that Mrs. Corbett had received at least the £17,073; that, as tenant for life, she could only receive income; and that any money received by her or credited to her formed part of her income for sur-tax purposes. The Commissioners held that Mrs. Corbett, being tenant for life of a share of the residue of the estate, was entitled to the income arising or accruing from that share as from the date of the testator's death, and that that income was rightly included in the computation of the total income of the appellant for purposes of sur-tax.

LAWRENCE, J., said that the question was, whether sur-tax was payable by the husband of a residuary life tenant in respect of the sums credited to his wife in respect of the period between the death of the testator and the ascertainment of the residue. The appellant contended that those credits were no part of the residue and did not come to his wife as taxable income, and he relied on *Sudeley* v. *Attorney-General* [1897] A.C. 11; *Dr. Barnardo's Homes National Incorporated Association* v. *Special Commissioners of Income Tax* [1921] 2 A.C. 1; and *Marie Celeste Samaritan Society of the London Hospital* v. *Inland Revenue Commissioners*, 43 T.L.R. 23. In his (his lordship's) opinion, the appellant was entitled to succeed. It was true that a residuary life tenant was entitled to be paid, at the time of the ascertainment of the residue, a sum which represented, as between him and the remainderman, his share of the income which had accrued during the period of administration: see *Allhusen* v. *Whittell*, L.R. 4 Eq. 295. He did not receive that as such income, but as a sum equal to the income: see per Lord Cave in *Dr. Barnardo's Homes* v. *Special Commissioners of Income Tax, supra.* In *Marie Celeste Samaritan Society of the London Hospital* v. *Inland Revenue Commissioners, supra*, Rowlatt, J., pointed that out, and he (Lawrence, J.) ought to follow that decision. It was sought to distinguish it on the grounds that there was no remainderman in existence, and that Rowlatt, J., did not decide that the sum was not income, but merely that it was not such income as was within the category defined in s. 37 (1) (*b*) of the Income Tax Act, 1918. Those distinctions did not affect the principle. Whether there was a remainderman or not in existence, the society, being the tenant for life, were not entitled to more than the interest of a tenant for life. The appeal must be allowed.

COUNSEL: *A. M. Latter*, K.C., *Lionel Cohen*, K.C., and *F. Heyworth Talbot*, for the appellant; *The Solicitor-General* (Sir Terence O'Connor, K.C.), *J. H. Stamp* and *R. P. Hills*, for the Crown.

SOLICITORS: *Tamplin, Joseph, Ponsonby, Ryde and Flux*; *Solicitor of Inland Revenue.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Anglo-Scottish Beet Sugar Corporation *v.* Spalding U.D.C.

Atkinson, J. 11th May, 1937.

MISTAKE—SUPPLY OF WATER BY LOCAL AUTHORITY TO COMPANY UNDER AGREEMENT—NEW AGREEMENT MADE FIXING LOWER CHARGES—ACCOUNTS SENT CHARGING COMPANY AT OLD RATE—INCORRECT ACCOUNTS PASSED BY COMPANY'S MANAGER—INCORRECT AMOUNTS PAID BY MANAGING DIRECTOR WITHOUT KNOWLEDGE THAT NOT IN ACCORDANCE WITH NEW AGREEMENT—MISTAKE OF FACT AS TO LEGAL RIGHTS—MISTAKE OF AGENT MISTAKE OF PRINCIPAL—DATE OF SOME OVERPAYMENTS MORE THAN SIX MONTHS BEFORE ACTION—LIMITATION.

The plaintiffs, a limited company, in 1925 entered into an agreement with the defendants, a local authority, for the supply by the latter of water. The agreement provided for a minimum payment by the plaintiffs in each quarter of the year. In 1927 the plaintiffs' managing director negotiated with the defendants an agreement providing for a reduced minimum quarterly payment. Notwithstanding the new agreement, the defendants continued sending in to the company demand notes based on the higher rate in the old agreement. The local manager of the company, who checked and passed the incorrect accounts, and the company's commercial manager, both thought that the company's rights were still regulated by the old agreement. The cheques drawn to meet the incorrect accounts were signed by the company's managing director with very many others without his bringing his mind to bear on the accuracy of the amounts for which the cheques were drawn. The plaintiffs, having discovered their mistake, claimed repayment of the amounts overpaid, and, the defendants having refused repayment, brought this action. Some of the overpayments were made more than six months before the date of the action. *Cur adv. vult.*

ATKINSON, J., said that the plaintiffs relied on *Kelly* v. *Solari* (1841), 9 M. & W. 54. Two passages from that case had frequently been cited: that of Parke, B., at p. 58, and that of Rolfe, B., at p. 59. That case had been considered by the House of Lords in *R. E. Jones, Ltd.* v. *Waring & Gillow, Ltd.* [1926] A.C. 670, and the passages from it had been cited with obvious approval. Precisely the same principle had been laid down in *Barrow* v. *Isaacs & Son* [1891] 1 Q.B. 417, see per Kay, L.J., at p. 426. *Primâ facie* therefore, the plaintiffs would seem to have a clear case, but it was contended for the defendants, firstly, that the plaintiffs' mistake was one as to their legal rights and obligations and therefore a mistake of law. A mistake of construction of a contract was treated as a mistake of law and not of fact. This argument of the defendants begged the question. In most cases of payment by mistake the person paying had made a mistake as to his legal right or obligation, and whether the payment could be recovered depended on whether that mistake was due to a mistake of fact or to one of law. In *Kelly* v. *Solari* (*supra*) the mistake as to the extent of a certain legal obligation was due to a mistake of fact, and therefore the payments could be recovered. *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149, was itself a complete answer to the defendants' argument. *Meadows* v. *Grand Junction Waterworks Co.* (1905), 21 T.L.R. 538, was another very good example of mistake as to legal right based on a mistake of fact. *Barber* v. *Brown* (1856), 1 C.B. (N.S.) 121, was another good example. That first argument therefore failed. The second was more formidable. It was said that no payment could be recovered which was made with full knowledge of the facts; that the payments here were the company's, and that the knowledge of their servants and agents was the company's knowledge, so that the company could not be heard to plead ignorance of any relevant fact. That argument was based on *London County Freehold & Leasehold Properties Ltd.* v. *Berkeley Property & Investment Co. Ltd.* (1936), 155 L.T. 190, which was concerned with a fraudulent misrepresentation. It was said that that case established that knowledge of all the agents was a company's knowledge; in other words that a principal might be held liable for a fraudulent misrepresentation although he and every agent had in no way fallen short of the highest standard of rectitude. Consideration of the law as it stood before the *London County Case, supra*, involved reference only to *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259, and *S. Pearson & Sons Ltd.* v. *Dublin Corporation* [1907] A.C. 351. Bearing those decisions in mind, he (his lordship) came to consider the *London County Case, supra*. There was nothing in Slesser, L.J.'s, judgment there to suggest the principle contended for by the defendants, but Romer, L.J.'s, judgment had given him (Atkinson, J.) the greatest difficulty. He could not, however, persuade himself that Romer, L.J., was laying-down a principle so broad as that the mere knowledge of an innocent agent, perhaps in another town or country, knowing nothing of the business in hand, made the innocent misrepresentation fraudulent on the part of the company. He (his lordship) was satisfied that a company could not be saddled with fraud unless some agent had guilty knowledge with reference to the misrepresentation complained of; and accordingly, even if the principles applicable to fraud applied to mistake (and he was far from saying that they did), there was nothing to prevent his holding here that the agent's mistake was that of the principal. With regard to limitation, the plaintiffs relied on *Freeman* v. *Jeffries* (1869), L.R. 4 Ex. 189, which was considered in *Baker* v. *Courage & Co.* [1910] 1 K.B. 56, and distinguished. In the latter case Hamilton, J., was of opinion that, except in cases within the principle of *Freeman* v. *Jeffries, supra*, time ran from payment. The same view was indicated in *In re Mason* [1928] Ch. 385. Accordingly, apart from the sums barred by statute, the plaintiffs were entitled to succeed.

COUNSEL: *O'Sullivan*, K.C., and *W. A. Sime*, for the plaintiffs; *Wallington*, K.C., and *M. Fitzgerald*, for the defendants.

SOLICITORS: *Savery, Stevens & Nutt*, agents for *R. A. Young*, Nottingham; *Smith, Rundell, Dods & Bockett*, agents for *Raymond W. Hastings*, Spalding.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Court of Criminal Appeal.

R. *v.* Stone.

Swift, Finlay and du Parcq, JJ.
29th July, 1937.

RAPE—VICTIM KILLED DURING ATTEMPT—NO INTENTION TO KILL—WHETHER MURDER.

Appeal from conviction.

The appellant was convicted before Lord Hewart, C.J., of the murder of one, Ruby Keen. The facts of the case, put shortly, were that Miss Keen and the appellant had been friendly before he went abroad as a soldier. After his return he had met her again on two occasions, and on the night of 11th April he had gone with her to a particular road in Leighton Buzzard, where her dead body was found next morning with a scarf knotted around the neck. Except for the strangulation there were no serious injuries to her body. The ground of appeal was misdirection by the Lord Chief Justice in answer to a written question submitted to him by the jury after their retirement. The question was in the following terms: "If as a result of an intention to commit rape a girl is killed, although there was no intention to kill her, is the man guilty of murder?" to which the Lord Chief Justice had replied: "Yes, undoubtedly." It was contended for the appellant that the direction of the Lord Chief Justice in answer to the above question was inadequate; that a man was never to be regarded as guilty of a crime until he had put it out of his power to withdraw from the completion of the crime; and that there was always a *locus poenitentiæ*.

SWIFT, J., giving the judgment of the court, said that, in the view of the court, the answer given by the Lord Chief Justice was right. As was clear from several of the cases which counsel for the appellant had submitted to the attention of the court, if a man, intending to commit a rape on a woman, but without the least intention to kill her, squeezed her by the throat in order to overpower her and in doing so killed her, that amounted to murder. Stephen, J., had so directed the jury in *Reg* v. *Serné*, 16 Cox. C.C. 311, and that proposition of law was repeated by Lord Birkenhead in *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479. It had been suggested

to the court that some guidance or assistance should be gathered from the cases which had been decided with reference to the liability of a person who had been concerned with an illegal operation, for the purpose of procuring abortion, from which death had resulted. The distinction, however, appeared to be quite obvious. In those cases, although an illegal act was being done, there was no intention to do any harm or anything against the wish of the person hurt; indeed, the desire was to help or assist that person. It might well be that in those cases the proper direction was that, if the jury thought that no reasonable person could contemplate that death would result from the act, they might find a verdict of manslaughter. But those cases were very different from the present. In the opinion of the court there was no ground whatever for the suggestion that the Lord Chief Justice in any way misdirected the jury in the answer which he gave to their question. The appeal must be dismissed.

COUNSEL: *Maurice Healy*, K.C., and *S. Granville Smith*, for the appellant; *Richard O'Sullivan*, K.C., and *Christmas Humphreys*, for the Crown.

SOLICITORS: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

[For Table of Cases previously reported in current volume see page iii of Advertisements.]

Legal Notes and News.

Honours and Appointments.

The Colonial Office announces the appointment of Sir EDWARD ST. JOHN JACKSON, O.B.E. (late Attorney-General, Ceylon) as Legal Secretary to the Government of Malta. Sir Edward Jackson was called to the Bar by the Inner Temple in 1910.

Mr. A. E. M. WEST, Assistant Prosecuting Solicitor to the Bradford Corporation, has been appointed to a similar post under the Southampton Corporation. Mr. West was admitted a solicitor in 1932.

Mr. JOHN EDWARDS, of the Town Clerk's Office, Salford, has been appointed Assistant Solicitor to the Swansea Corporation. Mr. Edwards was admitted a solicitor in 1936.

Professional Announcements.

(2s. per line.)

Messrs. LEADER, PLUNKETT & LEADER, solicitors, of 49 and 50, Newgate Street, E.C.1, announce that they are shortly removing to Cathedral House, 8 and 11, Paternoster Row, E.C.4.

Wills and Bequests.

Mr. William Alexander Tooke Hallowes, solicitor, of New Milton, Hants, left £19,280, with net personalty £13,011.

Sir John Charles Clegg, solicitor, of the firm of Clegg & Sons' of Sheffield, chairman of the Football Association, who died on 26th June, aged eighty-seven, left £24,834, with net personalty £22,640.

Mr. Henry Buxton Angier Ashton, solicitor, of Ruislip, and Sackville Street, W., left £12,065, with net personalty £6,720.

Mr. Arthur Clement Tweedy, solicitor, of Monmouth, a former Town Clerk of Monmouth, left £20,209, with net personalty £18,639.

The following days and places have been fixed for holding the Autumn Assizes on the Western Circuit:—

Mr. Justice HAWKE.—13th October, Devizes; 19th October, Dorchester; 26th October, Taunton; 2nd November, Bodmin; 9th November, Exeter.

Mr. Justice HAWKE and Mr. Justice HUMPHREYS.—22nd November, Bristol.

Mr. Justice HAWKE.—4th December, Winchester.

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (30th June, 1932) 2%. Next London Stock Exchange Settlement, Thursday, 23rd September, 1937.

	Div. Months.	Middle Price 8 Sept. 1937.	Flat Interest Yield.	‡ Approximate Yield with redemption
ENGLISH GOVERNMENT SECURITIES			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	107½	3 14 5	3 9 1
Consols 2½%	JAJO	73⅛	3 8 0	—
War Loan 3½% 1952 or after	JD	100⅛	3 9 11	3 9 9
Funding 4% Loan 1960-90	MN	110⅛	3 12 5	3 6 9
Funding 3% Loan 1959-69	AO	95	3 3 2	3 5 2
Funding 2¾% Loan 1952-57	JD	93	2 19 2	3 4 8
Funding 2½% Loan 1956-61	AO	87⅛	2 17 2	3 5 2
Victory 4% Loan Av. life 22 years	MS	107½	3 14 7	3 10 6
Conversion 5% Loan 1944-64	MN	113⅛	4 8 5	2 12 1
Conversion 4½% Loan 1940-44	JJ	106⅛	4 4 10	2 7 4
Conversion 3½% Loan 1961 or after	AO	99½	3 10 6	—
Conversion 3% Loan 1948-53	MS	98½	3 1 1	3 2 11
Conversion 2½% Loan 1944-49	AO	94¾	2 12 9	3 0 6
Local Loans 3% Stock 1912 or after	JAJO	84⅛	3 11 0	—
Bank Stock	AO	337½	3 11 1	—
Guaranteed 2½% Stock (Irish Land Act) 1933 or after	JJ	76½	3 11 11	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	84	3 11 5	—
India 4½% 1950-55	MN	112	4 0 4	3 6 10
India 3½% 1931 or after	JAJO	91½	3 16 6	—
India 3% 1948 or after	JAJO	77½	3 17 5	—
Sudan 4½% 1939-73 Av. life 27 years	FA	110	4 1 10	3 17 11
Sudan 4% 1974 Red. in part after 1950	MN	109	3 13 5	3 2 11
Tanganyika 4% Guaranteed 1951-71	FA	108	3 14 1	3 4 9
L.P.T.B. 4½% "T.F.A." Stock 1942-72	JJ	105	4 5 9	3 5 6
Lon. Elec. T. F. Corpn. 2½% 1950-55	FA	86	2 18 2	3 11 3
COLONIAL SECURITIES				
Australia (Commonw'th) 4% 1955-70	JJ	104	3 16 11	3 13 10
Australia (Commonw'th) 3% 1955-58	AO	89	3 7 5	3 15 4
Canada 4% 1953-58	MS	107	3 14 9	3 8 6
*Natal 3% 1929-49	JJ	99	3 0 7	3 2 3
New South Wales 3½% 1930-50	JJ	97	3 12 2	3 16 0
New Zealand 3% 1945	AO	96	3 2 6	3 12 5
Nigeria 4% 1963	AO	110	3 12 9	3 8 4
Queensland 3½% 1950-70	JJ	96	3 12 11	3 14 4
South Africa 3½% 1953-73	JD	101	3 9 4	3 8 4
Victoria 3½% 1929-49	AO	96	3 12 11	3 18 6
CORPORATION STOCKS				
Birmingham 3% 1947 or after	JJ	86½	3 9 4	—
Croydon 3% 1940-60	AO	94	3 3 10	3 7 5
*Essex County 3½% 1952-72	JD	102	3 8 8	3 6 8
Leeds 3% 1927 or after	JJ	84	3 11 5	—
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	98	3 11 5	—
London County 2½% Consolidated Stock after 1920 at option of Corp.	MJSD	71	3 10 5	—
London County 3% Consolidated Stock after 1920 at option of Corp.	MJSD	83	3 12 3	—
Manchester 3% 1941 or after	FA	83	3 12 3	—
Metropolitan Consd. 2½% 1920-49	MJSD	94	2 13 2	3 2 2
Metropolitan Water Board 3% "A" 1963-2003	AO	85½xd	3 10 2	3 11 5
Do. do. 3% "B" 1934-2003	MS	86½	3 9 4	3 10 6
Do. do. 3% "E" 1953-73	JJ	93½	3 4 2	3 6 3
*Middlesex County Council 4% 1952-72	MN	108	3 14 1	3 6 2
* Do. do. 4½% 1950-70	MN	113	3 19 8	3 5 3
Nottingham 3% Irredeemable	MN	84½	3 11 0	—
Sheffield Corp. 3½% 1968	JJ	101½	3 9 0	3 8 5
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS				
Gt. Western Rly. 4% Debenture	JJ	105½	3 15 10	—
Gt. Western Rly. 4½% Debenture	JJ	117⅛	3 16 7	—
Gt. Western Rly. 5% Debenture	JJ	128½	3 17 10	—
Gt. Western Rly. 5% Rent Charge	FA	127½	3 18 5	—
Gt. Western Rly. 5% Cons. Guaranteed	MA	124	4 0 8	—
Gt. Western Rly. 5% Preference	MA	116½	4 5 10	—
Southern Rly. 4% Debenture	JJ	104	3 16 11	—
Southern Rly. 4% Red. Deb. 1962-67	JJ	106⅛	3 15 1	3 12 1
Southern Rly. 5% Guaranteed	MA	125	4 0 0	—
Southern Rly. 5% Preference	MA	113½	4 8 1	—

*Not available to Trustees over par.

‡In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.

1937

rtain

Stock
1937.

‡ Approxi-
mate Yield
with
redemption

£	s.	d.
3	9	1
—		
3	9	9
3	6	9
3	5	2
3	4	8
3	5	2
3	10	6
2	12	1
2	7	4
—		
3	2	11
3	0	6
—		
—		
—		
—		
3	6	10
—		
—		
3	17	11
3	2	11
3	4	9
3	5	6
3	11	3
3	13	10
3	15	4
3	8	6
3	2	3
3	16	0
3	12	5
3	8	4
3	14	4
3	8	4
3	18	6
—		
3	7	5
3	6	8
—		
—		
—		
—		
—		
3	2	2
3	11	5
3	10	6
3	6	3
3	6	2
3	5	3
—		
3	8	5
—		
—		
—		
—		
—		
—		
3	12	1
—		
—		

en calculated